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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 425

BERNARD BANE,
PETITIONER,

v.

SUPERINTENDENT OF BOSTON STATE HOSPITAL,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in the above-entitled case on September 17, 1965.

Opinions Below

The Order of the Superior Court is printed in the Record, p. 8. The decision of the Supreme Judicial Court of Massachusetts was entered and its rescript issued on April 28, 1966. The opinion of the Supreme Judicial Court is re-

ported in Mass. Adv. Sheet 1966 Adv. Sheets 693 and is printed in Appendix A.

Jurisdiction

The judgment of the Supreme Judicial Court was entered on April 28, 1966, and is printed in the Appendix B. The jurisdiction of this Court is invoked under the United States Code: Section 1257 (3) of Title 28.

Order Granting Extension of Time

On July 19, 1966, Mr. Justice Fortas of the United States Supreme Court signed an order extending the time within which the petitioner may file a petition for writ of certiorari in the case at bar to and including August 15, 1966.

Questions Presented

1. Whether jurisdiction upon this Court may be conferred under circumstances where the petitioner has failed to expressly claim federal constitutional protection but nevertheless where a substantial issue of public importance is involved and where the respondent has expressly answered to the said federal question in his brief, and where it is deemed that the state's highest tribunal based its decision upon an inadequate and untenable non-federal ground?

2. Whether a state statute expressly excluding from inspection by a patient or his attorney, the records of a hospital or clinic under the control of the State Department of Mental Health, constitutes a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution?

Constitutional Provisions and Statutes Involved

The pertinent provision of Mass. Gen. Laws chapter 111, sec. 70 as amended through St. 1964 c. 653 reads as follows:

> "... Section ten of chapter sixty-six shall not apply to such records; provided that such records and similar records kept by such hospital, dispensary or clinic, or sanatorium, *except a hospital or clinic under the control of the department of mental health*, may be inspected by the patient to whom they relate or by his attorney upon delivery of a written authorization from the said patient, and a copy shall be furnished upon his request and a payment of a reasonable fee; and provided, further, that upon proper judicial order, whether in connection with pending judicial proceedings or otherwise, or, except in the case of records of hospitals under the control of the department of mental health, upon order of the head of the state department having jurisdiction or control of such hospital, dispensary, or clinic, or sanatorium and in compliance with the terms of said order, such records may be inspected and copies furnished on payment of a reasonable fee."

A copy of the complete Act of 1964, Chapter 653 is printed in Appendix C.

The pertinent provision of the Fourteenth Amendment to the United States Constitution reads:

> "... No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process

of law, nor deny to any person within its jurisdiction the equal protection of the law".

Statement

This case involves a denial of a petition for a writ of mandamus which was filed in the Suffolk County Superior Court, Commonwealth of Massachusetts on September 17, 1965 in which the petitioner prayed that the respondent, Superintendent of the Boston State Hospital, be commanded to permit the petitioner to examine, and to obtain copies of, the records of the petitioner's admission and detention at the said Boston hospital in 1963. (R-3).

On October 1, 1965, a hearing was held in said Suffolk Superior Court before Pillsbury, J., and the petition was denied. (R-8).

On April 6, 1966 this case was heard on appeal before the said Supreme Judicial Court of Massachusetts and on April 28, 1966 the decision "order denying petition affirmed" was rendered with an opinion by Chief Justice Wilkins of said Court.

The Raising of the Federal Question

The federal question raised by this case was presented to the Supreme Judicial Court of Massachusetts in the respondent's brief in which the respondent argued (on page 4) that,

> "... The statute involved does not deprive the petitioner of any right guaranteed under the Constitution of the Commonwealth or the United States of America. To invoke Constitutional principles some right of the petitioner relating to life, liberty or property must have been taken away, injured or threatened.".

Reasons For Granting the Writ

Referring to question number one of the questions heretofore presented, petitioner submits that there plainly exists in the records a basis from which can be drawn a question involving the repugnancy of the said state statute with the U.S.C.A. Const. Amend. 14; that the presence of the said federal issue is further evidenced by the fact that the respondent had answered to the said federal question in his brief, and that the petitioner's rights under the said Const. Amend. 14 are jeopardized by reason of the aforementioned repugnancy.

Petitioner further submits that the decision below raises federal questions of substance and general importance and that they have been decided erroneously by the Court below. The present case represents the first instance in which the constitutionality of a state statute in which is stipulated the express exclusion from inspection by a patient or his attorney, the records of a hospital or clinic under the control of the State Department of Mental Health, has been put in issue. Petitioner further submits that in as much as the instant case involves questions of substantial public importance, including of which is the issue of state repugnancy with the Fourteenth Amendment to the Federal Constitution, the decision rendered by the said state's highest tribunal that "there has been no violation of Art. 5 of the Declaration of Rights of the Constitution of the Commonwealth" without further passing on whether there has been any federal repugnancy constitutes an insufficient and untenable non-federal ground. Hence, notwithstanding the fact that the petitioner failed to expressly claim federal protection, jurisdiction is nevertheless conferred upon this Court.

Referring to the second question of the questions hereto-

fore presented, petitioner submits that the said state statute does violence to U.S.C.A. Const. Amend. 14.

Petitioner submits that the said state statute by its present language serves to abridge the privileges of certain United States citizens from obtaining an accountability of their confinement in the said state institutions which thereby jeopardizes their right to redress of grievance. The said state statute serves also to deny to the said United States citizens their equal protection of the law within the meaning of the said Fourteenth amendment in as much as patients of said state mental institutions are singled out without regard to their diagnosis to be precluded from their heretofore right to examine their records in the said institutions.

The cases relied upon to sustain the jurisdiction of this court are as follows:

In the case of *Williams* v. *Kaiser*, Mo. 1945, 65 S.Ct. 363, 323 U.S. 471, 89 L.Ed. 398, the court held that it will be presumed that state court based its decision on federal grounds, and United States Supreme Court will take jurisdiction, if independent state ground was not a substantial or sufficient one for the decision.

In the case of *Ward* v. *Love County*, 1920, 40 S.Ct. 419, 253 U.S. 17, it was held that non-federal grounds put forward by the highest state courts as the bases for its decision, but which are plainly untenable, cannot serve to bring the case within the rule that the federal Supreme Court will not review the judgment of a state court where the latter has decided the case upon an independent ground not within the federal objections taken, and that ground is sufficient to sustain the judgment.

In the case of *United Broth. of Carpenters & Joiners of America* v. *U.S.*, Call 1947, 67 S.Ct. 775, 330 U.S. 395, 91 L. Ed. 973, it was held that the Supreme Court possesses

power to notice a "plain error" though it is not assigned or specified.

In the case of *Lovell* v. *City of Griffin*, Ga., 1938, 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed. 949, it was held that the mere question as to whether the violation of a defendant's constitutional rights was adequately presented and decided in the state court is itself a "federal question", as respects Supreme Court's jurisdiction.

Conclusion

Since the questions involved are as novel as they are important, and for the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Allston, Massachusetts 02134

Appendix A

S-13, 552

BERNARD BANE vs. SUPERINTENDENT OF BOSTON STATE HOSPITAL.

WILKINS, C.J. The prayer in this petition for a writ of mandamus is that the respondent superintendent of the Boston State Hospital be commanded to permit the petitioner to examine, and to obtain copies of, the records of the petitioner's involuntary "admission and detention" at that hospital in 1963. The petitioner appealed from a denial of the petition.

The Boston State Hospital is under the control of the Department of Mental Health. G. L. c. 19, § 5. Its records are subject to G. L. c. 111, § 70. The petitioner relies upon § 70, as amended by St. 1945, c. 291. That statute in its present form, however, is as amended through St. 1964, c. 653, which contains an exception expressly excluding from inspection by a patient or his attorney the records of "a hospital or clinic under the control of the department of mental health."

The petitioner contends that St. 1964, c. 653, was enacted in violation of Senate Rule 50,[1] but the violation is not conceded. In any event, the statute cannot be thus impugned in a court of law. *Field* v. *Clark*, 143 U. S. 649, 672. *Sears* v. *Treasurer & Recr. Gen.*, 327 Mass. 310, 321. *Weeks* v. *Smith*, 81 Maine, 538, 547. 81 C. J. S., States, § 39.

There has been no violation of art. 5 of the Declaration of Rights of the Constitution of the Commonwealth.

Order denying petition affirmed.

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[1] "No motion or proposition of a subject different from that under consideration shall be admitted under the color of an amendment."

Appendix B

JUDGMENT

April 28, 1966. Order denying petition affirmed.
Rescript April 28, 1966.
Reasons as on file.

Appendix C

THE COMMONWEALTH OF MASSACHUSETTS

1964

Advance copy — Acts and Resolves

KEVIN H. WHITE, *Secretary of the Commonwealth*

ACTS, 1964.—CHAP. 653.

571

Chap. 653. AN ACT PROVIDING THAT RECORDS SHALL BE KEPT BY HOSPITALS, DISPENSARIES OR CLINICS, AND SANATORIA SUPPORTED BY THE COMMONWEALTH AND THAT SUCH RECORDS SHALL BE ADMISSIBLE IN EVIDENCE.

Be it enacted, etc., as follows:

Chapter 111 of the General Laws is hereby amended by striking out section 70, as most recently amended by chapter 23 of the acts of 1963, and inserting in place thereof the following section:—*Section 70.* Hospitals, dispensaries or clinics, and sanatoria licensed by the department of public health or supported in whole or in part by the commonwealth shall keep records of the treatment of the cases under their care and the medical history of the same. Such records may be made in handwriting, or in print, or by typewriting, or by the photographic or microphotographic process, or any combination of the same. Whenever pre-existing records shall have been photographed or microphotographed and the photographs or microphotographs shall have been duly indexed and filed, such hospital, dispensary or clinic, or sanatorium, upon notifying in writing the supervisor of public records referred to in chapter sixty-six, may destroy the original records so photographed or microphotographed, and such photographs or microphotographs shall have the same force or effect as the original records from which they were made. Such records shall be in the custody of such hospital, dispensary or clinic, or sanatorium. Section ten of chapter

sixty-six shall not apply to such records; provided that such records and similar records kept by such hospital, dispensary or clinic, or sanatorium, *except a hospital or clinic under the control of the department of mental health,* may be inspected by the patient to whom they relate or by his attorney upon delivery of a written authorization from the said patient, and a copy shall be furnished upon his request and a payment of a reasonable fee; and provided, further, that upon proper judcial order, whether in connection with pending judicial proceedings or otherwise, or, except in the case of records of hospitals under the control of the department of mental health, upon order of the head of the state department which issues the license or of the head of the state department having jurisdiction or control of such hospital, dispensary or clinic, or sanatorium and in compliance with the terms of said order, such records may be inspected and copies furnished on payment of a reasonable fee. Any such record or any part or portion thereof may be destroyed fifty-five years after the discharge or the final treatment therein of the patient to whom it relates.

Approved July 2, 1964.